

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 26896-9-III
)	
Respondent,)	
)	
v.)	Division Three
)	
FRANCISCO RIOJAS CUELLAR,)	
)	
Appellant.)	UNPUBLISHED OPINION

Korsmo, J.—Francisco Cuellar was convicted of one count of unlawful possession of a firearm. His defense counsel requested, but the trial court declined to give, an instruction telling the jury that mere proximity was insufficient to establish constructive possession of the weapon. The court’s instructions properly advised the jury of the law. There was no abuse of discretion by declining to give the requested instruction. We affirm.

FACTS

About 3:00 a.m., a police officer heard shots from a small caliber weapon and

stopped the only vehicle in sight. Two men were seated in the front seat and one, Mr. Cuellar, was seated in the back. At his feet was a .22 caliber handgun. The men were arrested. Two .22 Remington bullets were still in the gun. An investigation later found four Remington .22 shell casings in the street not far from where the vehicle was stopped.

Mr. Cuellar was charged with first degree unlawful possession of a firearm. He stipulated to the jury that he had the requisite prior conviction to support the charge, so the only issue at trial was whether or not he possessed the weapon. His sister testified that the gun was hers and was stored under the driver's seat. The defense argued that the gun did not show up in the back seat until the car was towed away after the arrests.

Defense counsel sought an instruction defining the term "possession" that also told the jury that mere proximity to a firearm was not sufficient evidence to establish constructive possession. The trial court instead instructed the jury based on the language of the first paragraph of 11A Washington Practice, Washington Pattern Jury Instructions: Criminal 133.52, at 617 (3d ed. 2009) (WPIC):

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.

Clerk's Papers (CP) 40. This instruction was identical to that proposed by defense

counsel except for the omission of a final sentence: “Mere proximity to a firearm is not sufficient to establish constructive possession.” CP 22. There was no instruction requested concerning the definition of “dominion and control.”

The trial court declined to include the “proximity” language in its possession instruction, but did agree that defense counsel could argue to the jury that proximity was not sufficient to establish possession. Counsel did so, stating that “mere proximity to an item does not constitute constructive possession.” Report of Proceedings (RP) 224. The prosecutor argued in rebuttal, over an unsuccessful objection, that “mere proximity to a weapon, you won’t see those words in the law of the case.” RP 226.

The jury sent a question to the court during deliberations, asking: “Does the fact that the gun was at the feet of the defendant meet the criteria of ‘in possession’ of the firearm?” CP 27. The court told the jury to look at the instructions. CP 27.

The jury convicted Mr. Cuellar as charged. After the court imposed a standard range sentence, Mr. Cuellar appealed to this court.

ANALYSIS

This appeal presents a single issue – did the court err in declining to include the “proximity” sentence in its definition of “possession”?

The law in this area is well settled. Jury instructions are sufficient if they correctly

state the law, are not misleading, and allow the parties to argue their respective theories of the case. *State v. Dana*, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). The trial court also is granted broad discretion in determining the wording and number of jury instructions. *Petersen v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. Cuellar argues that his proposed language is a correct statement of the law and was necessary for him to be able to argue his theory of the case. This court has many times recognized that mere proximity does not establish constructive possession of an item. *E.g., State v. Shumaker*, 142 Wn. App. 330, 333, 174 P.3d 1214 (2007). The pattern instruction recognizes that proximity is simply one factor to be looked at in determining whether someone is exercising dominion and control over an item.¹ However, saying that proximity is insufficient to establish dominion and control does not define what constitutes dominion and control.² In the absence of a dominion and control definition, the proximity language, while a correct statement of the law, is largely

¹ The optional second paragraph of WPIC 133.52 states: “Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.”

² The optional third paragraph of WPIC 133.52 gives nonexclusive examples of factors that demonstrate dominion and control such as the ability to take actual possession of the item.

meaningless.

Nonetheless, the question in this case is whether or not the court's unchallenged instruction permitted Mr. Cuellar to argue his theory of the case. It did. In fact, defense counsel expressly told the jury that mere proximity did not establish dominion and control. RP 224. The definition of constructive possession as dominion and control gave both sides freedom to argue the point to the jury.

The definition of "possession" used by the court was correct and permitted both sides to argue their theories of the case. Accordingly, the instruction was sufficient and there was no error in giving it. *Dana*, 73 Wn.2d 533.

Since the parties did not seek a definition of dominion and control, the trial court had a tenable basis for not including the proximity language in its definition of "possession." Language that negated a concept that the court had not even defined was unnecessary. The trial court most certainly did not abuse its "broad discretion." *Petersen*, 100 Wn.2d 421.

The conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the

No. 26896-9-III
State v. Cuellar

Washington Appellate Reports, but it will be filed for public record pursuant to RCW
2.06.040.

Korsmo, J.

WE CONCUR:

Schultheis, C.J.

Kulik, J.